COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PYBURN REALTY TRUST

v.

LYNNFIELD ZONING BOARD OF APPEALS

No. 02-23

DECISION

March 22, 2004

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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DECISION

This is an appeal by John B. Wise, Trustee of Pyburn Realty Trust, from a decision of the Lynnfield Zoning Board of Appeals, which granted a comprehensive permit subject to conditions, pursuant to G.L. c. 40B, §§ 20-23, for the construction of mixed-income affordable housing. According to Appellant, several of the conditions would make the project uneconomic and are not justified by local needs.

The conditions contested by Pyburn include requiring a decrease in the number of units from 20 to 16, requiring 6 instead of 5 affordable units, redesigning the project so that the buildings are on the opposite side of the property, requiring fire suppression sprinkler systems in all of the units, requiring looping of the water source, and requiring the market rate units to be owner occupied.

The Committee finds that the conditions imposed by the Board make the project uneconomic. However, the conditions requiring Appellant to include a sprinkler system and

looping of the water source are found to address valid health, safety, design, or other local concerns that outweigh the regional housing need. The Developer's proposal to move the buildings further away from the abutters' property lines effectively mitigates the local concern as to the overall design of the development. The Committee finds that there is nothing in the language of G.L. c. 44, § 53G, which supports a conclusion that "attorney fees" were intended to be included as "fees for the employment of outside consultants," and therefore does not have authority to require the payment of such fees.

I. PROCEDURAL HISTORY

On October 15, 2001, John B. Wise submitted an application to the Lynnfield Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23, to build 20 attached townhouses in four buildings as part of a development to be known as Pyburn Mews. Of the 20 units, 5 would be affordable housing to be sold at 80% of the median income. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF), in cooperation with its member bank, Century Bank. Exh. 3. After due notice, public hearings were held on November 6, and December 4, 2001, and continued on March 14, May 14, June 18, and July 9, 2002. On August 7, 2002, the Board approved the application for a comprehensive permit subject to 57 conditions. Exh. 3. Pyburn argues that several of the conditions would make the proposal uneconomic, and were not required by similar projects completed locally. Therefore, Appellant filed an appeal with the Housing Appeals Committee on August 27, 2002. In response, the Board asserts that the preventive or corrective measures are necessary to mitigate local concerns as they address fire safety and the limitations that the

dimensions of the property have on the layout of the structures and their interrelation with the surrounding neighborhood.

The Committee conducted a site visit, held a 5-day, *de novo* hearing, with witnesses sworn, full rights of cross examination, and a verbatim transcript. Witnesses for Pyburn included Peter Ogren, a licensed professional civil engineer and land surveyor; John B. Wise, Trustee of Pyburn Realty Trust; Patrick Sharkey, an architect; and Robert Engler, a housing and community development consultant. Witnesses for the Board included John C. Smith, chairman of the Lynnfield Zoning Board; David Comeau, a broker associate from Northrup Associates of Lynnfield; Brian Colpak, an abutter; Benjamin B. Smith, a professional civil engineer; Robert P. Mackendrick, assistant fire chief for the town of Lynnfield; Lynn Goonin Duncan, a landscape architect; and David Miller, a member of the Lynnfield Zoning Board. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the Applicant must be a limited dividend organization, and it must control the site. 760 CMR 31.01(1). The Board granted the permit based upon the Applicant having met these requirements. Exh. 3, pp. 4-5. In addition, the Board acknowledges that the Town of Lynnfield has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock is subsidized housing). 760 CMR 31.04; Exh. 3, p. 5.

B. Motion to Dismiss

On September 19, 2002, the Board filed a motion to dismiss arguing that failure to comply with a duly enacted "rule" of the Board for the conduct of its business pursuant to Chapter 40B and a "condition" of the decision granting the comprehensive permit forecloses Appellant's right to an appeal of that decision. The rule referred to by the Board is entitled "Application Review Fees" and was adopted on May 27, 1997. The rule basically states that the Board may charge an applicant a review fee for the reasonable costs incurred to engage outside consultants to assist with the review of an application or petition for a variance, special permit, or comprehensive permit. The rule also explains how funds received will be administered and allows an applicant the right to an appeal to the board of selectmen to exclude the use of any consultant that has a conflict of interest or does not meet the minimum required qualifications. Condition 57 of the Board's decision granting the current permit states that the applicant has ten days to pay all outstanding invoices for the consultants hired and that no building permit shall be issued if this condition is not satisfied. However, nothing in the rule or the condition states that failure to comply would result in the Appellant waiving its right to an appeal before this Committee.

In addition, the Committee directs the Board's attention to *Bloom v. City of Worcester*, 363 Mass. 136, 293 N.E. 2d 268 (1976). As stated in *Bloom*, a town may adopt a local *bylaw* to exercise any power or function which the general court has power to confer upon it, as long as it is *not inconsistent with* or repugnant to state law. *Id.* at 149-157. In the current instance, the basis of the Board's assertion of authority is even further removed, in that it is not based on a locally adopted bylaw but being found instead in an established rule and a condition in the

decision. Even if the Committee were to disregard this imperfection, the Board's adoption of a rule or regulation to preclude an applicant's right to an appeal as specifically authorized in G.L. c. 40B, § 22, would clearly be an exercise of power that is inconsistent with state law. For these reasons, the Committee denies the Board's motion to dismiss this appeal.

II. FACTUAL BACKGROUND

The project site consists of approximately 3.6 acres of land located at the end of Pyburn Road in the Residential-B (RB) District as defined by the Town of Lynnfield Zoning By-Law (bylaw). Exh. 4, 5 & 9. The RB District allows for a one family detached house on any lot. Exh. 4. Set backs within the RB District are 60 feet from the street center line, with a front yard depth of 40 feet, a side yard width of 20 feet, and a rear yard depth of 20 feet. Exh. 4. No building is allowed that exceeds three stories or 40 feet in height. Exh. 4. The bylaw does not contain regulations regarding multi-family housing. Exh. 4; Tr. II, 79, 133; Tr. III, 113; Tr. V, 26. The project as proposed would include the construction of 20 condominiums in 4 town-house style buildings. Exh. 3. Of the 20 units, 5 would be offered as affordable units. Exh. 3. Three of the affordable units would be 3-bedroom and two would be 2-bedroom. Exh. 3.

The property is presently unimproved and is bordered on the southerly side by Route 128 and on the westerly side by land owned by the City of Peabody and a 100-foot wide Massachusetts Electric Company easement. Exh. 9. The east side of the property is connected to the end of Pyburn Road by an existing road that is approximately 300 feet in length, which passes through a wetland area and over Hawkes Brook. Exh. 9. To the north are five single-family

homes that directly abut the property. Exh. 9. The project is to be served entirely by Town water connections and on-site septic. Exh. 9.

During the local hearing, the Board granted the comprehensive permit with conditions, of which several are argued by Appellant to make the project uneconomic. Amongst those raised by the parties as being in dispute are the reduction in the number of units to 16, increasing the number of affordable units to 6, changing the layout of the buildings so that they are on the south side of the property, requiring the market rate units be owner-occupied, limiting the maximum price of the affordable units to 70% of the median income, requiring residential sprinkler systems in each dwelling unit, requiring looping of the water system to maintain water pressure and for fire suppression, and requiring the payment of attorney fees for review of this project. Exh. 3.

III. APPROVAL WITH CONDITIONS

When a zoning board of appeals has granted a comprehensive permit subject to conditions, the burden is on the Appellant to first prove that the conditions "in aggregate" make construction and operation of the housing "uneconomic." 760 CMR 31.06(3); *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, slip op. at 10 (Mass. Housing Appeals Committee Jan. 8, 1998). Specifically, the developer must prove that "the conditions imposed...make it impossible to proceed... and still realize a reasonable return as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); see also G.L. c. 40B, § 20.

If the developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which

supports the conditions, and then that such concern outweighs the regional housing need." 760 CMR 31.06(7). It is then the developer's burden to prove that there are preventive or corrective measures that have been proposed which will mitigate the local concern, or that there is an alternative means of protecting the local concern. 760 CMR 31.06(9).

A. Uneconomic

Appellant argues that the conditions decreasing the overall number of units while increasing the number of affordable units makes the project uneconomic. John B. Wise and Robert Engler offered credible testimony on the estimated costs and profit that would be expected for the original proposal of 20 units with 5 affordable units.[1] Tr. I, pp. 8-35; Tr. III, pp. 16-25; Exh. 14, 17. A report completed by an outside consultant for the Board found the financial projections for the project to be generally reasonable and within the normal industry range of costs. Exh. 16. The expected profit margin on the project was estimated to be approximately 10-11%. Tr. I, p. 115-116; Tr. III, p. 23-24. According to Mr. Engler's testimony, the profit margin is within the minimum amount of return that is typically considered financially feasible by the NEF. Tr. III, p. 23-24. In considering the economic feasibility of the project the Board proposal to decrease the overall number of units to 16 while increasing in the number of

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1 The Board argues that these witnesses did not provide credible testimony, as they could not explain in detail the derivation of all of the figures on the proformas. Mr. Wise testified that the proformas were prepared under his direction and review, by his senior project manager. Tr. I, 108. A proforma, as presented in the initial phase of the comprehensive permit scheme, is a hypothetical financial statement showing the estimated costs and profits as based on the assumption that certain events will occur. As these are estimations, it is more important that the figures represented on the proforma are reasonable and in keeping with industry standards than it is to explain the step-by-step derivation of each and every figure.

affordable units to 6, Mr. Engler determined that the project would result in a loss to the Developer of approximately $227,225. Exh. 23, 24; Tr. III, p. 24.

The Board argues that each of the market rate homes could be sold for approximately $10,000 more than estimated by Appellant. Exh. 15. Taking that argument to be true, it would at most increase the overall profit for the 10 market rate units by $100,000, which would still result in a loss of $127,000 for the project as conditioned by the decision. The Board also argues that the Appellant's profit estimates for the sale of the affordable units are too low, but it did not provide any information that would allow the Committee to determine what additional profit would result by the increase in unit price. Furthermore, any difference derived from the use of higher estimates for the affordable units would be decreased by the Boards condition that restricts the sale of the affordable units to 70% of the median income. Based on the testimony and evidence provided, the Committee finds that Appellant has met its burden in demonstrating that the conditions make the project uneconomic.

B. Consistent with Local Needs

Since the Applicant has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for housing. 760 CMR 31.06(7).

1. Design Concerns

Condition #2 includes two changes to the project as originally proposed by Appellant, specifically requiring a decrease in the number of buildings and a redesign of the building layout.

The layout change has been referred to as the "flip" and would require that the buildings abutting the northern property line be flipped around to the south side of the property.[2] Exh. 3. The Board argues compliance with this condition is necessary to decrease the negative impact the project will have on the adjacent neighborhood, improve the overall aesthetics of the design, to address problems with site density, and to allow for open space on the site. These concerns involve the related issues of density and intensity.

a. Intensity

According to the Board, it was necessary to condition the permit on a decrease in the number of units, as the project site is long and narrow and limited in use by the presence of wetlands and rock ledge, resulting in insufficient developable space to allow for adequate privacy and for useable open space for the future residents of the development. Tr. V, 20. In response, Appellant argues that the project is well within the range of densities that have been previously approved by the Committee, being no greater than 7.9 units per acre. Tr. II, 83. As the Board's arguments do not relate to density, but rather to the intensity of uses on the site, Appellant's response does not appropriately address the issue raised. Although closely related to density, intensity involves the functioning of the housing on the particular site, which includes questions such as the adequacy of open space and recreational space, the functionality of common areas, the provisions made for the privacy of the tenants, the accessibility of the site to and from other parts of the neighborhood, and related factors which look to whether the number of units are too large not for the surrounding area but for the particular parcel of land. See *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 26 (Mass. Housing Appeals Committee Jan. 8, 1998).

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2 In addition, the condition requires that the footprints of the "flipped" buildings are no closer than 100

The site plan shows four closely spaced buildings facing on paved roadway and paved parking.[3] Exh. 19. There are two long narrow landscaped areas on the north and south side of the developed area, which appear to be no greater than 20 feet in width, and separate the development from Route 128 and the Fletcher Street neighbors. Exh. 19. The plan also shows two areas that are readily identifiable as open space on the east and west ends of the development. Exh. 19. The larger of the two areas is located on the east side of the project area and is predominately wetlands. Exh. 19. The other is a much smaller triangular area at the extreme western side of the project site and is shown as landscaped.[4] Exh. 19. The site is surrounded on three sides by private property and on the remaining side by Route 128. There is no immediate open space or recreational area that are accessible from the site and the nearest public playing field is almost a mile away. Tr. I, 80.

Despite the visual appearance of the plan, Appellant argues that the Board's expert witness agreed that at least 30.8 % of the property is definable as "usable open area." Exh. 36; Tr. IV, 52-53. The Board asserts that although there are areas of "open space" on the site, it is not the kind of open space that is suitable for the development of tot lots or for any form of active recreation and is therefore not really "usable."[5] Tr. V, 16-21. The Board also asserts that the

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feet from the northern property line.

3 Appellant has requested relief from the 20-foot side yard setback and the 150-foot lot frontage as required by § 10.8 of the Town of Lynnfield Zoning Bylaw. Exh. 3. The buildings as shown on the site plan are approximately 35 feet apart. Exh. 19; Tr. II, 89. The rear setbacks meet the minimum amount of distance for compliance with the local bylaw for single residence zoning, with the buildings being approximately 20 feet from the property line. Tr. II, 79.

4 This is a triangular area of land that measures 140 feet long by 100 feet at the base. The plan shows trees in the center of the triangle. Exh. 19. Moving the tree plantings to the outer edges and leaving the central portion open could provide an area for some types of outdoor recreation.

5 Some passive recreation would be possible, however, the project plans do not indicate any areas for either form of recreation.

proposed development contains excessive amounts of parking with unnecessary expanses of pavement that would add to run-off on the site and these areas could be put to better use for recreation or open space. Tr. V, 14. Although the units are designed to have decks in the rear, the Board argues that the decks would not afford privacy and would be too small in area to provide for any form of active recreation use because they are right up against the property line. Tr. V, 14. Additionally, there is no private usable space in front of the units. Tr. V, 14. According to the testimony provided by Appellant's architect, one of the groups expected to be interested in the purchase of units within the development are young married couples looking for "starter homes" that will allow them to have room to start a family. Tr. II, 92.

Although greatly restricted by the shape of the project area, the design of the proposed housing does not appear to make appropriate use of the space available. The buildings are situated too closely to the abutting properties and the amount of parking proposed is greater than necessary. However, it is also apparent that the space problem can be adequately addressed without having to require the proposed "flip" design. Appellant has suggested measures that would increase the amount of open space and provide for privacy.

The developer's civil engineer testified that there was room to move the buildings "pretty much consistently 10 feet or so" further away from the abutters in a southerly direction. Tr. V, 143-144. In addition, the design shows approximately 35 to 60 feet of space on the parking lot side of the buildings marked A, C, and D. Exh. 19. By eliminating the parking spaces[6] in front of Unit A and shortening the parking space available in front of the garages on the units directly

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6 Condition #3 in the Board's decision limits the number of parking spaces to 48. Exh. 3. Appellant has not appealed that condition and is willing to adhere to a decrease in the number of parking spaces from the original proposal of 61. Appellant's Post-Hearing Brief, p. 16.

south of the abutters' property lines, it would be possible to move these three buildings at least an additional 10 feet to the south. These two modifications should double the distance from the buildings to the abutters' property lines from 20 to 40 feet or more.

The site plan does not show any landscaping along the property line with the abutters. Exh. 2. The Appellant admitted that no provision for landscaping along that line had been proposed. Tr. II, 104; Exh. 2. However, Appellant has not appealed Condition #5, which states "the landscaping shall, to the maximum extent feasible, provide screening between the neighboring dwellings and this project." Exh. 3. Compliance with this condition is necessary and will provide screening and privacy for the occupants of the proposed housing. The plants selected should be at least 8 to 10 feet in height and should be of a type to provide screening throughout the year.[7]

The Committee finds that the increase in the depth of the backyards and the vegetative screening will adequately ameliorate the Town's concerns as to intensity of uses on site.

b. Density

According to the Board, it was necessary to decrease the number of buildings and to change their layout, as they are too close to each other and to the abutters' property lines. As mentioned above, no landscaped screening or buffering has been proposed by the Developer to provide for privacy or to soften the visual impact on the abutters. The distance from the decks adjacent to three of the proposed buildings is approximately 13 feet from the property lines of the Fletcher Road abutters. Tr. V, 27; Tr. IV, 54. The Board contends that moving the structures further away would result in less of a visual impact on abutting property owners and would help

to mitigate the noise coming from Highway 128 for the Fletcher Road neighbors. In addition, the Board argues the "linear design" of the three northerly buildings is aesthetically unpleasing as it creates a wall-like or barracks-like effect. The Board argues that this will result in the Fletcher Road neighbors being faced with a wall of buildings, all of which will be longer and taller than their own. Tr. II, 68-69 Tr. V, 14. These are issues related to the density of the proposed development in relation to the surrounding area. "An analysis of density involves determining the impact of the development on factors ranging from municipal services and traffic to esthetics and overall livability of the surrounding neighborhood." See *Hastings Village*, No. 95-05, slip op. at 20.

In response, Appellant points out that from all indications on site, it would not be possible to flip the buildings to the opposite side of the project area as there are outcroppings of rock that would make placement of the septic on the south side of the project implausible, if not impossible. Tr. V, 144. In addition, the proposed change would result in the sewage system being on the uphill side of the site and if the parking lot were to be placed over it, then the lots would have a grade above the buildings. Tr. V, 144-145. The Board's expert witness also testified that outcrops are present in the area in which the septic would have to be located in order to comply with the condition requiring the buildings to be moved to the other side of the site. Tr. IV, 80. He could not state with any certainty that flipping the design was a viable option and testified that at the very least additional percolation tests would be necessary to determine if relocating the septic was possible. Tr. IV, 77. Furthermore, as part of the Board's peer review,

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7 White pine and arborvitae are two examples of plants that could provide appropriate vegetative screening.

no recommendation had been made by this witness to flip or reduced the number of buildings. Tr. IV, 84.

As a general matter, it is certainly permissible for a board to impose a condition that limits the size of a development when necessitated by the site or the surrounding area. *Hastings Village*, No. 95-05, slip op. at 10, n.4, aff'd No. 00-P-245 (Mass.App. Ct. Apr. 25, 2002). Here the Board has argued that due to the limited amount of space between the buildings and the neighboring properties, the reduction in the number of buildings and flipping the location of the buildings addresses a real concern brought about by the size and shape of the site.

However, a "board must review the proposal submitted to it, and may not redesign the project from scratch." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992). There is no doubt that the Board has attempted to redesign the project from scratch in this instance.[8] In addition to reducing the number of buildings, the Board has changed the entire layout by proposing a flipping of the buildings to the opposite side of the property, despite information provided by the Developer that locating the septic system on the opposite side of the project area does not appear to be a feasible option.[9]

Appellant's proposed changes to deal with the intensity problems of the site design are also applicable to resolve the Board's concerns as to density. Moving the buildings further away from the private property lines and adding a vegetative screen along those lines, will increase the privacy for the neighbors and decrease the visual impact that the buildings will have on the

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8 The Board's engineer testified that for Appellant to comply with this condition, it would be required to re-engineer the site at a cost of at least $30,000 and $2,500 for the additional percolation tests. Tr. IV, 99.

surrounding neighborhood. Although the Board argues that the linear design of the buildings is esthetically unpleasing, it is comparable to the alignment of single family homes in this area. Tr. V, 128. The civil engineer also testified that slightly turning or angling the buildings could provide additional distance between the buildings and the abutting properties. This would also assist in addressing the linear design issue of the three northerly units. Tr. V, 142.

2. Looping of the Water System

Appellant requests flexibility to choose its preferred connection to the local water supply and has proposed three scenarios for connection. According to testimony for Appellant, the first possibility for water connection is at Pyburn Road. Tr. I, 64. This line comes down Salem Street through a ten-inch line and then to a six-inch line that is very old and probably tuberculated that runs up Pyburn Road. Tr. I, 62. The six-inch line is an old, poor piping system that provided flows of approximately 300 gallons a minute. Tr. I, 62-63. Appellant's civil engineer testified "there really was not a good water supply in that location." Tr. I, 64. In addition, the engineer stated that the flows on Pyburn Road were below what he "would want to see in any area for fire protection." Tr. I, 66. This option would require upgrading 1,100 feet of line from Salem Street and up Pyburn Road to the site with an eight-inch line. Tr. I, 66-67. The cost of the improvement is estimated to be approximately $110,000. Tr. I, 67. However, the Committee finds that the testimony provided by both parties strongly indicates that even with upgrades to the

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9 The Developer provided evidence that it is more likely than not, that the south side of the project area contains rock ledges that would make placement of the septic on that side of the project area impractical. Tr. I, 50-51; Tr. III, 111; Tr. IV, 80, 84, 103; Tr. V, 144-145.

pipe, a connection to Pyburn Road would create an unacceptable fire suppression problem that would outweigh the need for housing at this site.

The other options bring water in off of Fletcher Road, which has an eight-inch line that loops back to the line on Salem Street. Tr. I, 64. Bringing water in from Fletcher Road would require less than two hundred feet of line and would necessitate emplacement of a portion of that line through an existing easement. Tr. I, 68. The flows on Fletcher Road are in excess of 1,000 gallons a minute. Tr. I, 65; Tr. IV, 140. The water source along Fletcher Road is currently a loop. Tr. IV, 142. There are two options proposed for bringing in water from the line at Fletcher Road, which are either by looping a line from Fletcher Road over to Pyburn Road or by coming in off of Fletcher Road and dead-ending the piping in the development. Tr. I, 65. Looping from Fletcher Road to Pyburn Road, would provide for greater water quality and would significantly increase the flow of water for firefighting within the proposed development and for the adjoining neighbors on Pyburn Road. Tr. I, 65-66, 69-70; Tr. IV, 141. Although the exact cost of these two options was not provided, it was estimated that the looping option would be roughly $12,000 more than the dead end option. Tr. I, 73-75.

Of the three options, Appellant would prefer the option that would be the least expensive, specifically a dead end line coming in off of Fletcher Road. Tr. I, 134. However, Appellant expressed a concern that since another party[10] is questioning the use of the easement from Fletcher Road, it would like to maintain an option to upgrade the line from Salem Street through Pyburn Road. Tr. I, 134-135.

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10 The party was un-named, but is not a party in the current case.

In response, the Board offered the testimony of Assistant Fire Chief Robert Mackendrick that 1000 gallons a minute at 20 PSI is considered by the National Fire Professional Association and the Insurance Service Officer, as the minimal water pressure advisable for firefighting within *single family* residential areas.[11] Tr. IV, 114. Therefore, the water supply off of Pyburn Road would be far below the minimum residential requirements for fire suppression. Tr. IV, 138. This witness also testified that proposal for connecting from the system at Pyburn Road would not be adequate to meet these minimum requirements for fire suppression. Tr. IV, 139-140. Furthermore, adding 20 additional units within the development would further degrade the flow rates of the water system along Pyburn Road. Tr. IV, 147.

According to Mr. Mackendrick's testimony, flow rates from Fletcher Road are adequate for firefighting needs, however, a dead end line could result in both flow and maintenance problems. Tr. IV, 140. If a break in the pipe should occur at or along that line, there would be no water for domestic use or for fire suppression. Tr. IV, 142. Although the flow rates along Pyburn Road would not be adequate for fire suppression, looping to that road would still provide some water for domestic use and for fire suppression if water became unavailable from Fletcher Road. Tr. IV, 144.

The evidence provided by the parties supports a finding by the Committee that it is necessary to loop the water system from Fletcher Road to Pyburn Road, as it is the only option that adequately addresses the Town's legitimate local concern that there be at least a limited amount of water supply for fire safety and domestic use should a break in the line occur on the Fletcher Road side of the development. 760 CMR 31.06(7).

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11 According to Mr. Mackendrick, the necessary water pressure for multifamily units is usually

3. Sprinkler System

Condition # 33 of the Board's decision requires a residential sprinkler system in each dwelling unit. Appellant argues that the cost of such a system for 20 units would be between $45,000 to $90,000, and is not required by the state building code. Tr. I, 134; Tr. II, 88; Appellant's Post-Hearing Brief at 11. According to Appellant, the state building code does not make sprinkler systems a requirement in multiple single-family dwellings as long as a two-hour rated firewall separation assembly is provided and each unit has an independent means of egress. Tr. II, 84-86; Exh. 21. In addition, the witness testified that there is adequate separation between the buildings that would not require the installation of sprinkler systems. Tr. II, 89.

The Board argues that even if the state building code does not require a sprinkler system, it is still necessary in the current instance. According to the assistant fire chief, the recommendations made by the local fire department were based on an understanding that sprinklers would be installed in all of the units. Tr. IV, 115-133. Without the sprinkler system the fire department would have required better access around the buildings, the water pressure to be based on the size of the structures and the separation of the buildings, the turning circle to be larger, and possibly even greater distance between the buildings. Tr. IV, 115, 123-124, 132.

The Town has made the inclusion of sprinkler systems a primary focus regarding any new construction of any size. Tr. IV, 120-121. The assistant fire chief testified that the Town has required sprinkler systems in the other 40B project in town, the elderly housing developments, the schools, all commercial buildings over 7,500 square feet, the proposed senior center, and two residential homes that had less than adequate driveway access. Tr. IV, 121-123.

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determined by the size of the structure and separation of the buildings. Tr. IV, 115.

In addition this witness testified that requiring a residential sprinkler system in the current development could significantly assist in fire suppression where response time for a fire occurring at night or on the weekends could be as long as eight minutes. Tr. IV, 129. Nationally accepted figures indicate that 97.2 percent of all fires are extinguished by properly installed sprinkler systems. Tr. IV, 130. Residential sprinklers provide for safety of both the occupants and firefighters in case of a fire, as well as saving lives and property. Tr. IV, 122, 128. The assistant fire chief also testified that although the alternative fire safety requirement calls for the installation of two-hour firewalls, it does not mean that such walls will keep the fire out for two hours. Tr. IV, 127. The fire could spread across the roof, under the wall, or through walls damaged by inappropriate installation of cable, wiring, plumbing or door. Tr. IV, 127.

Even if the project as proposed meets the stated minimal requirements of the building code, the structures within this development are in aggregate very closely spaced together, increasing the danger that fire could spread from one structure to another. Only one access into the development has been proposed, and fire suppression vehicles will have limited access to the sides and no access to the back of the buildings. The local fire department reviewed the proposal with the understanding that sprinklers would be included in the units and allowed the project to be held to a lesser standard than it normally would have in reviewing such a project without a sprinkler system. Therefore, the Committee finds that based on the facts as presented in the current case, the condition requiring sprinkler systems in the units addresses valid fire safety concerns and those concerns outweighs the regional housing need.

4. Remaining Conditions (Conditions 2, 23, 25, 29 & Snow removal)

As the Applicant met its burden of proving that the conditions required by the decision of the Board would make the project uneconomic, the burden of proof was on the Board to show that there is a valid health, safety, environmental, or other local concern that supports compliance with the portion of Condition # 2 that would require an increase in the number of affordable units and Condition 23 requiring all of the units to be owner occupied. As the Board has failed to meet this burden, these conditions will be stricken given there is no evidence to support the Board's position.[12] See 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee, Dec. 15, 1998). Appellant did not pursue its initial objections regarding wetlands protection (Condition 29) and the condition requiring snow removal in all instances. According to testimony for the Board, the snow removal condition was intended to mean that snow should be plowed, shoveled or otherwise cleared and not that it was necessary to remove the snow from the premises. Tr. III, 138. Condition 25(c) assures a "window" of affordability, in that the maximum sale price for affordable units shall be the maximum purchase price for which a household with an income that is 70% of the median family income for the applicable Standard Metropolitan Statistical Area can qualify, based on standard bank underwriting practices. According to Mr, Engler, who testified on behalf of the Appellant, that although it is permissible to go to 80%, almost every town he has worked with asks for 70% and that is now the standard practice as it allows for a window of affordability. Tr. III, 29.

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12 Further, by not briefing these issues or presenting evidence, it is arguable that the Board waived these claims. See *An-Co, Inc. v. Havehrill Board of Appeals*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

Furthermore, Mr. Engler used the 70% median income in reviewing the developer's proforma. Tr. III, 28-29. Appellant did not pursue this issue in its post-hearing brief and therefore it is deemed waived.

5. Payment for Outside Consultants – Payment of Attorney Fees.

G.L. c. 44, § 53G, states "Notwithstanding the provisions of section fifty-three, any city or town that provides by rules promulgated under . . . section 21 of chapter 40B . . . for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account." According to the Board, they have promulgated such rules for the collection of reasonable fees for outside consultants. The Board also notes that the collection of such fees is in keeping with the Housing Appeals Committee's Model Local Rules, Section 4.00, entitled "Review of Applications and Review Fee."

However, the Board's adaptation of this rule goes further than the Model Rules by listing the types of services for which the Board may require payment by the comprehensive permit applicant. According to Rule 14, promulgated by the Town of Lynnfield and entitled "Application Review Fees (Variance, Special Permit, Comprehensive Permit)," the Board may require that the applicant pay a "review fee" consisting of reasonable costs incurred by the Board for the employment of outside consultants to assist in the review of a comprehensive permit application. In addition, Rule 14 states "in hiring outside consultants, the Board may engage engineers, planners, *lawyers*, urban designers or other appropriate professionals who can assist

the Board in analyzing a project to ensure compliance with all relevant laws, ordinances/bylaws, and regulations."[13]

Appellant does not challenge the engineering fees of $9,010.94, the financial consultant fee of $2,362.50, or the fee for the traffic study consultant amounting to $1,500. Appellant, however, states that it believes that there is "some manifest unfairness and unreasonableness" in requiring an applicant to pay for the Town's attorney fees,[14] which in the current instance amount to $19,423.50.[15] The Committee agrees.[16] Nothing in G.L. c. 44, § 53G, G.L. c. 40B, § 21, or Section 4.00 of the Model Local Rules, suggests that the payments of attorney fees is considered as part of "outside consultant review fees."

As noted above, G.L. c. 44, § 53G, implies that "rules promulgated under section 21 of chapter 40B," can include the imposition of reasonable fees for the employment of outside

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13 As written, Rule 14 is problematic. Stating that the purpose of the consultants is to ensure compliance with local ordinances, bylaws and regulations, is not in keeping with the purpose of G.L. c. 40B, which provides relief from local zoning bylaws and practices which might inhibit construction of low and moderate income housing. See *Zoning Bd. of Appeals of Greenfield v. HAC*, 15 Mass. App. Ct. 553, 555, 446 N.E.2d 748, 750 (1983). Furthermore, the applicant does not have to *ensure compliance* with state law as part of the initial comprehensive permit application process. Even on appeal the "applicant need only provide sufficient evidence to prove that the project as proposed, "complies generally" with state and federal requirements or other generally recognized design standards." See *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 11 (Mass. Housing Appeals Committee Jan. 26, 2004).

14 Requiring the applicant to pay for the Town's legal counsel raises professional ethical considerations, specifically involving conflict of interest, and such an arrangement could routinely run afoul of Rule 1.7 and 1.8(f) of the Massachusetts Rules of Professional Conduct.

15 The Board cannot succeed in arguing that the attorney acted as an "expert on 40B" and not as an attorney. Ms. Netter was listed as counsel for the Town during the proceedings before the Committee and all of the invoices submitted for verification of her services stated, "for legal services rendered."

16 This Committee has previously stated that we have grave doubts about the enforceability of any unilaterally imposed requirement that attempts to shift the town's legal expenses to the applicant, and we do not approve of it. See *John Owens v. Belmont*, No. 89-21, slip op. at 16 (Mass. Housing Appeals Committee June 25, 1992).

consultants.[17] "Statutory language is the primary source of legislative intent." *National Lumber Co. v. United Cas. and Sur. Ins. Co.*, Inc. 440 Mass. 723, 727, 802 N.E.2d 82, 86 (2004). Therefore, it is necessary to look at the wording of section 21, to establish whether or not attorney fees could be included as a fee for outside consultants. There are two portions of section 21 that are relevant. Section 21 states, "the board of appeals shall adopt rules, not inconsistent with the purpose of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk." The Board argues that it has met this requirement in promulgating Rule 14. However, a rule that requires the applicant to pay the majority of the cost for the initial application review by paying for both the technical review and legal services, could be cost prohibitive to the development of low and moderate income housing. Requiring an applicant to pay the town's attorney costs could deter some developers from applying for a comprehensive permit, particularly for projects involving a small number of units. The Committee therefore finds requiring the developer to pay the Town's attorney fees to be inconsistent with the purpose of the statute.

In addition, it seems reasonable to review the statute for guidance as to what is meant by the word "consultant." There is one direct reference to consultants in Section 21, "the board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and *shall have the authority to use the testimony of*

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17 However the Court in *TBI, Inc. v. Board of Health of North Andover*, 431 Mass. 9, 18, 725 N.E.2d 188, 195 (2000), indicated that the language of "General Laws c. 44, s. 53G, does not authorize a local board to assess a supplemental fee, but only authorizes a local board to deposit any fees collected in a special account." The Court further stated that G. L. c. 111, s. 31 (as mentioned in 53G), does not authorize a board of health to assess technical assistance fees, since that statute only authorized that board to adopt reasonable health regulations. However, G. L. c. 40B, s. 21, allows a board of appeals to adopt rules for the conduct of its business that is not inconsistent with the purpose of the statute.

consultants." Although this language may not be immediately enlightening, read in conjunction with the entire section, and specifically the preceding sentence which discusses height, site plans, size or shape, and building materials, it is clear that consultant as used in the statute are to provide "testimony" or "explanation" on technical aspects of the proposed project to assist the board in making an informed decision as to whether the project is consistent with local needs.

That consultants are to provide *technical* verification of the proposed project is further supported by the provisions of § 53G, requiring that the consultant meet the minimum qualifications of "an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field," which is also reflected in Section 4.00 of the Model Local Rules. Section 53G does not require professional licensing, certification, or admission to the bar. "Where the language is plain and unambiguous, it is conclusive of the Legislative purpose." Id. The Committee cannot "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose." Id.

The Committee finds nothing in the language of either statute to support the Board's conclusion that a reasonable consultant fee can be interpreted so broadly as to include payment of the Town's attorney fees. Consequently, the Committee finds that G.L. c. 44, § 53G, and G.L. c. 40B, § 21, allows the Town to collect $12,873.44 from Appellant for reasonable consultant fees for technical review of the original application, but not for reimbursement of attorney fees.[18]

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18 Massachusetts generally follows the "American Rule" which denies recovery of attorney's fees absent a contract or statute to the contrary. See *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 95, 686 N.E.2d 989, 991 (1997). "Underlying the rule that the prevailing litigant is not entitled to collect his attorney's fees from the loser is the principle that no person should be penalized for defending or prosecuting a lawsuit." See *Police Comm. of Boston v. Harris*, 429 Mass. 14, 705 N.E.2d 1126 (1999).

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Lynnfield Board of Appeals. Further, the Committee concludes, pursuant to G. L. c. 40B, §23, that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision, and specifically Conditions 2, 23, 25, and 45 of the comprehensive permit (Exhibit 3) shall be deleted. Condition 57 is limited to consultant fees and excludes attorney fees.

2. The development shall be constructed as shown on Sharkey Design Company Site Plan for "Pyburn Mews" dated May 8, 2001 (Exhibit 19). The permit will be for the construction of 20 units of mixed-income affordable housing, with 5 units being sold as affordable units according to the guidelines established by the funding agency and in compliance with HUD guidelines.

3. At least an additional 20 (twenty) feet of space must be added to the north side of buildings marked A, C, and D, on the Pyburn Mews Site Plan. This should increase the distance from the buildings to the abutters' property lines from 20 to 40 feet or more. The buildings

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Moreover, as mentioned in the text above, the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits. See *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). If the Town is asserting that the bylaw constitutes a written agreement or contract between the Town and the Developer, then it will be necessary for the Town to bring a suit for breach of that contract in another forum, as it would be outside of the authority of this agency to adjudicate.

should be slightly turned or angled to provide additional distance between the buildings and the abutting properties and to address the linear design of buildings marked A, C, D. Landscaping shall, to the maximum extent feasible, provide screening between the neighboring dwellings and this project.

4. The water system is to be a looped system from Fletcher Road over to Pyburn Road.

5. Residential sprinkler systems are to be installed in each dwelling unit and shall be subject to review and approval by the Lynnfield Fire Chief.

6. All plans will have the required stamps affixed to them.

7. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, s. 23 and 760 CMR 31.09(1), this Final decision shall for all purposes be deemed the action of the Board.

8. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of this subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G. L. c. 40B, §22 and G. L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: March 22, 2004

Werner Lohe, Chairman

Joseph P. Henefield

Frances C. Volkmann

Glenna J. Sheveland, Research Counsel